Supreme Court, U.S.
FILED

no. 041326 DEC 30 2004

OFFICE OF THE CLERK

In The

Supreme Court Of The United States

Allen v. Jaffe

Petitioner,

v.

Dr. Ronald Mark Landess, DPM

Respondent

On Petition for Writ of Centiorari to the

the Supreme Court of the United States

Petition for Writ of Certiorari

Allen v. Jaffe
pro se
3211 fox chase drive
Midlothian, Va. 23112
phone: 804-744-8381
fax: 804-744-8381

Mr. John R. Walk
counsel of record
Hirschler Fleisher
701 East Byrd street
Richmond, Va. 23219
phone: 804-771-9519
fax: 804-644-0957

QUESTION PRESENTED

Whether the court erred in dismissing the case below as res judicata? The issue is whether the proponent may assert the defensive use of res judicata when he himself lacked identity because he was not a party to the prior actions, in any capacity, and has he has failed to support its claim of privity to assert such absent identity.

PARTIES TO THE PROCEEDING

Petitioner is Allen V. Jaffe , pro se, who was the plaintiff, pro se.

Respondent is Dr. Ronald Mark Landess, DPM, in his capacity as a Virginia licensed physician health care provider, who was the defendant.

TABLE OF CONTENTS

Questions Presented.....i

Parties to the Proceeding.....ii

Table of Contents.....iii

Table of Cited Authorities.....iv

Table of Appendices.....vi

Opinions Below.....1

Statement of Jurisdiction.....1

Constitutional and Statutory Provisions Involved...1

Statement of the Case.....3

Reasons for Granting the Writ.....10

Conclusion.....15

TABLE OF AUTHORITIES

Amstadt v. U.S. Brass Corp.,
919 S.W. 2d at 652-653.....12,13

Anderson v. Sisson,
170 Va. 178,182, 195 S.E. 688.....9

Angstadt v. Atlantic Mutual Insurance Co.,.....15
249 Va. 444, 457, S.E. 2d 86 (1995)

Bates v. Devers,
214 Va. 667, 671, 202 S.E. 2d 917,921(1974).....15

Benson v. Wanda Petroleum Co.,
468 S.W. 2d 361, 363 (texas 1971).....13

Bierce v. Hutchins,
205 U.S. 341.....8

Bistline v. United States,
229 Fed. 546.....8

Cluett v. Medical Protective Co.,
829 S.W. 2d 822, 826 Tex. App. (1992).....8,14

Glasco v. Ballard,
249 Va. 61, 452 S.E. 2d 854 (1995).....15

Nero V. Ferris,
222 Va. 807, 813, 284, S.E. 2d 823, 831 (1981).....12

Piittson Co. v. O'hara,
191 Va. 886, 63 S.E. 2d 34.....9

Southern Pacific Co. v. Hogart,
250 U.S. 483.....8

Storm v. Nationwide Mutual Insurance Co.,
199 Va. 130, 134-135, 97 S.E. 2d 759,
7622 (1957).....13

STATUTES

Virginia Code 13.1-1308.....15

Virginia Code 13.1-1019.....15

Virginia Code 13.1-1020.....15

OTHER AUTHORITIES

Moore's Federal Practice,
0.411 [3.1] (2d ed. 1084).....12

TABLE OF APPENDICES

Appendix A-- Circuit Court of Henrico County opinion letter..... A-1

Appendix B-- Circuit Court of Henrico County Final Order..... B-1

Appendix C-- Circuit Court of Henrico Order Imposing Sanctions.....C-1

Appendix D-- Supreme Court Of Virginia denial of Petition for appeal..... D-1

Appendix E-- Supreme Court of Virginia denial of petition for rehearing..... E-1

Appendix F-- Signature on Company operating agreement not in capacity of physician..... F-1

Appendix G-- Argues his capacity as a physician not an issue,, his medical license not necessary; and that he does not use the hair removal device on patients..... G-1

Appendix H--Article concerning dangers and damages caused by improper misuse of the Epilight and other Hair removal devices which go ignored under law..... H-1

Petitioner respectfully petitions for a Writ of Certiorari to review the judgments of the Circuit Court and the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the Circuit Court of September 17, 2004, as the outline for the final order as Appendix A to the petition is unpublished

The opinion of the Supreme Court Of Virginia appears as Appendix B to the petition and is unpublished

STATEMENT OF JURISDICTION

The petition for rehearing to the Supreme Court Of Virginia was denied on October 1, 2004.

The jurisdiction of the court is invoked under 28 U.S.C. $ 1257

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented implicate the following provisions of the Unites States Constitution:

Seventh Amendment

States in pertinent part:

"The right of trial by jury shall be preserved"

Ninth Amendment

States in pertinent part:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment

States in pertinent part:

"No state shall make or enforce any law which shall bridge the privilege or immunities of citizens of the united states; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Code Title 28 sec. 1257 (a)

States in pertinent part:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme court by writ of certiorari where the validity of a treaty or statute of the united states is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the united states....

Virginia Code 13.1-1308

States in pertinent part:

"A membership interest in a limited liability company is personal property".

Virginia Code 13.1-1019

States in pertinent par:

No member, manager or other agent of a limited liability company shall have any personal obligation for any liabilities of a limited liability company, whether such liabilities arise in contract, tort or otherwise, solely by reason being a member, manager or agent of a limited liability company.

Virginia Code 13.1-1020

States in pertinent part:

A member of a limited liability company is not a proper party by or against a limited liability company, exept where (I) the object is to enforce a member's rights against or liability to the limited liability company or (ii) as provided in Article 8 (13.1-1042) of this chapter.

STATEMENT OF THE CASE

Background

Petitioner has tried for over three years to have his medical malpractice claim heard and decided by a jury. The outcome of this medical malpractice claim will affect tens of thousands of people throughout the world who have been and continue to be injured as a result of unapproved, and dangerous use of the Epilight medical device for "permanent hair removal"(see exhibit "article" attached as Appendix H.

The respondent wants this court to forget that the petitioner is the victim and it was this petitioner who was injured by Dr. Landess' because he used or authorized or failed to supervise

the use of an FDA controlled medical device, in an adulterated manner, for the unapproved use of "permanent, painless hair removal. He would like this court to forget that contrary the consent form signed, he was never present during the hair removal treatments.

The respondent has and continues to portray the petitioner's previous actions as being "frivolous", when in fact, they are well intentioned , and intended only for the purpose of receiving the justice and protection that he and the public at large are deserving under the laws, and our Constitution..

It all started when petitioner responded to Virginia Phototherapy's ad offering "permanent hair removal" using an FDA controlled medical device called "Epilight".

The company assured petitioner that if he underwent 3-4 treatments per area of hair removal, that the hair would be permanently removed. They did not tell petitioner of the hazards nor did they list them in their consent form. They did no inform the petitioner how painful the treatments would be, nor did they tell him that the Epilight device they would use, had not been approved by the FDA for the "permanent hair removal" they advertised and promised.

Based on their promises petitioner agreed to undergo the treatments. He signed a consent form which specified that the procedures **would be performed** or be **supervised** by **Dr. Landess.**

The petitioner expected Dr. Landess to be present and do the treatments, but only the technician was present to perform the procedures. Prior to the first session of treatments, the technician did not do any pre-treatments to determine if petitioner's skin could even tolerate the

treatments. Consequently, on the first session, the treatments resulted in near second degree burns to the petitioner's back. It was by a miracle that his injuries were not life threatening or that he did not suffer scarring like the many other patients nationwide (See newspaper article included as Appendix H.)

On the next visit and on subsequent visits, since the Dr. was not present, petitioner told the technician performing the procedures about the burns and she simply apologized . She told petitioner that the burning and resulting welts were **"normal",** and not to be concerned. On those assurances, in spite of the weekly burning and pain on the different parts of petitioner's upper body, he completed the series of treatments over a three month period. Shortly after the series of treatments, all the hair grew back.

The fraudulent treatments not only cost almost $4,000.00(Four thousand dollars), but they caused petitioner to suffer repeated pain, burning, and suffering, over a three month period. So, when the hair grew petitioner, petitioner asked for a full refund.

The company refused to give petitioner a refund,; instead they told him that all he needed ongoing "maintenance treatments, which he could receive at discounted prices. Petitioner then told them that, that was not what they promised and ;therefore, that their offer was unacceptable. Failing to resolve the matter amicably, the petitioner filed a claim against the sole defendant, Virginia Phototherapy, L.L.C, for the purpose of recovering his money.

The action he filed in circuit court styled No. CLO1-1543 languished for a considerable time because he was unaware of court civil procedures, particularly the need to notice and set motion hearings. However, during that period when the

case was languishing in limbo, petitioner contacted the FDA and found out that the device they were using had not been approved for "permanent hair removal" and that petitioner's hair would never be "permanently removed". Petitioner also found out that the company was aware all along that the device was not approved for "permanent hair removal" and that it was not even permitted to be advertised for use in such "permanent hair removal" .

Without any regard for petitioner's health and safety, Virginia Phototherapy had petitioner undergo painful and dangerous hair removal treatments using an FDA controlled medical device, for an unapproved purpose that they knew would be **ineffective** in "permanent hair removal" .

After speaking with the FDA, Petitioner then believed that there existed grounds for a legitimate cause of action for medical malpractice. Petitioner filed his action against the same sole defendant, Virginia Phototherapy, L.L.C., whom he, at the time, believed was a Virginia licensed health care provider. The matter was in Circuit Court and was styled Allen V. Jaffe v. Virginia Phototherapy, L.L.C., No. CLO-1543.

Furthermore, in order to protect the public from the same injuries, under the believe that he had legal, petitioner sought an injunction to prohibit its adulterated use of the device on other patients. The petition for injunctions was denied on grounds that petitioner lacked the standing to file the action.

With regards to the first matter, CLO1-1543, in which petitioner sought a refund, and the med-mal action styled CLO1-2094, the judge ruled that petitioner could not maintain two separate claims against the same defendant at the same time. In response to that rule, a motion to

consolidate the cases was filed , but the court denied that motion.

Consequently, in order to proceed before the court, petitioner was ordered to choose between the two actions. Still believing that he had a righteous medical malpractice claim, petitioner chose to proceed under medical malpractice. The court then dismissed case No. CLO1- 1543 and set a trial date for the med-mal action No. CLO1-2094.

The defendant, Virginia Phototherapy then "sucker punched", so to speak, the petitioner by filing a demurrer in which he then argued that Virginia Phototherapy, L.L.C., was not a licensed healthcare provider , and therefore, not actionable under the Virginia Medical Malpractice Act.

Defendant's memorandum argued among other things, that although it performed hair removal procedures, that it was not a prerequisite to be a health care provider in order to perform those procedure; and , that although Virginia Phototherapy was owned by the licensed physician, Doctor Ronald Mark Landess, DPM, such ownership was a mere "fortuity"(see Appendix G attached), because being a physician health care provider was not a requirement for performing the "permanent hair removal treatments". At best, the Doctor's involvement was limited to occasionally adjusting the settings on the device, and that an unsupervised technician (attached Appendix G) did the hair removal treatments and pretty much managed the hair removal business.

Based on defendant's arguments, and over this petitioner's objections, the court dismissed the action CLO1-2094 for lack of jurisdiction under medical malpractice. The court dismissed the action for lack of jurisdiction under the

premise that Virginia Phototherapy, L.L.C. was not a licensed health care provider; and therefore, not actionable under the Virginia Medical Malpractice Act.

Since the medical malpractice action was only dismissed for lack of jurisdiction, and upon discovery of this court's ruling in Bistline v. United States, 229 Fed. 546; Bierce v. Hutchins, 205 U.S. 341; Southern Pacific Co. v. Hogert, 250 U.S. 483; and others, in which this court stated that "because it is well settled that the pursuit of a remedy which a party may think entitled to, but to which it develops he is not, does not bar the bringing of a suit on the remedy which does not exist" and others" ; petitioner filed his personal injury action styled CLO2-1730 against Virginia Phototherapy; and this medical malpractice action against Dr. Landess, styled CLO2-1729, in his capacity as a physician health care provider.

According to Bistline, the previous action against Virginia Phototherapy styled CLO1-2094, should not have served as a bar to any future actions against either Virginia Phototherapy or Dr. Ronald Mark Landess; yet the judge, **after disqualifying herself for bias and prejudice,** permitted it to serve as a bar, and dismissed the action against Virginia Phototherapy, L.L.C., No. CLO2-1730 as being res judicata.

Now, Dr. Landess asserts that the action against Virginia Photo styled CLO2-1730 now acts as a bar against this medical malpractice action against Dr. Landess, the physician health care provider, styled CLO2-1730, under the same theory of res judicata.

Dr. Landess, the respondent pleads res judicasta even though he was never a defendant in either case no. CLO1-1543 or

CLO1- 2094 or CLO2-1730 and was never asked to be present, nor did he volunteer to present evidence or testimony in any of those proceedings; and as such, he was not bound by the judgment relied on; Pittson Co. v. O'hara, 191 Va. 886, 63 S.E. 2d 34; see also Anderson v. Sisson, 170 Va. 178, 182, 196 S.E. 688; on the principle that estoppels must be mutual, no person is entitled to take advantage of a former judgment or decree, as decisive in his favor of a matter in controversy, unless, being a party thereto, he would have been prejudiced by it had the decision been the other way.

Also, Virginia Phototherapy by its own admission, is not, and has never been a healthcare provider; and only licensed health care providers are actionable under medical malpractice. Furthermore, at no time during any of the proceedings against Virginia Photo did they represent or seek to represent the issues or interests of Dr. Landess' in his capacity of a Virginia licensed physician health care provider.

Dr. Landess intended that his relationship with the company, be totally distinct and separate as demonstrated by the company's organization as a Limited Liability Co. rather than a Professional Limted Liability Company, and the way he signed the company operating, not in his capacity of physician but rather as Ronald Mark Landess (Attached as Appendix F).

The company further enlarged their separateness through their arguments that, it is only a matter of "fortuity" that Dr. Landess is a physician; because, the company did not need a physician in order to perform "permanent hair removal treatments using the FDA controlled medical device.

Dr. Landess, in his capacity as a physician, claims the affirmative defense of res judicata with Virginia Phototherapy to bar the action against him personally. Because Dr. Landess' in his capacity as a licensed Virginia health care provider could not satisfy required four identities necessary to assert immunity under res judicata and collateral estoppel with Virginia Phototherapy, L.L.C., he now seeks that res judicata by asserting privity with the company.

Dr. Landess, DPM, seeks that privity even though (a) in the medical malpractice against the company, he avoided being a party to that original action, in which the judge, on objections even denied a motion to add him as a defendant, (b) it was held out to the world his "arms length" separateness from the company he owned in which he now claims privity, (c) his interests as a physician, health care provider, under the Virginia Medical Malpractice Acts, are so separate and so distinct from the interests of the company, a non healthcare provider company, that representation of one is not, and cannot be, representation of the other, especially in consideration that he is himself as a physician structured himself as a Virginia professional corporation, and (d) because in asserting that privity, he has failed to satisfy Virginia's traditionally honored requirement of "mutuality".

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The erroneously dismissal under res judicata through the improper application of privity, satisfies multiple criteria for Supreme Court review.

The lower courts are in disarray on this issue, and its

determination is of considerable national importance. The application of privity, mutuality and res judicata are important where uniformity counts. The decision below has a significant impact not just on this petitioner but on a large segment of the population who would lose their right to "a bite of the apple" because of the misapplication of privity and res judicata..

The decision requires certiorari because it implicates our Constitutional rights by (a) denying the right of trial by jury under the 7th Amendment, (b) disparagement of rights as guaranteed under the 9th Amendment; (c) denying the equal protection of the laws under the 14th Amendment.

The decision requires certiorari because it is in conflict with previous decisions by the Virginia Supreme court rulings, other states , and the federal courts of appeal.

The decision will implicate the stockholders of companies involved in medical malpractice actions nationwide and actions against small corporations and companies . Just as easily as Dr. Landess seeks privity and mutuality solely by being the company's sole member and stipulated manager in order to escape prosecution; injured parties in reverse would also be able to hold the sole members or stockholders of small corporations and companies, personally liable for the actions of the company. Such mutual liability could also possibly serve to blur the distinction and the protection afforded health care provider physicians, to be able hold them personally liable for the actions of a non health care provider company just because they own stock in the company.

Imagine the chaos in the investment or entrepreneurial community, if a being a sole member or stockholder could

so easily be held personally liable for the actions and liabilities of the companies that they invest in.

Finally, certiorari should be granted because the erroneous decision ignored basic principles of res judicata jurisprudence which state that for a party to be bound by or take advantage of a prior suit, that party or its privy must not only have been present in both suits, but it has to appear in the same capacity in both suits. See 1B Moore's Federal Practice 0.411 [3.1] (2d ed. 1984).

If for instance, a party appears in the first action as a fiduciary or in some other representative capacity, a second suit in which the same party appears representing his individual interests is not precluded. The rationale, of course, is that the party's individual interests were not asserted or opposed in the prior action. In fact, the party's representational responsibilities might have been precluded him as a matter of substantive law from asserting such individual interests in the first action.

A party appearing in an action in one capacity, individual or representative, is not bound or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity. The general rule is that a judgment is conclusive for or against a party only in the capacity in which he litigated the matter.

Therefore, it must be concluded that even if Dr. Landess had been present (which he was not) and offered testimony on behalf of the company as the manager, his testimony as an owner or manager would only have represented the company's interests, not his own, as a Virginia licensed healthcare physician provider.

Res judicata only binds those who were parties to the previous litigation or their privies. Amstadt v. U.S. Brass Corp., 919 S.W. 2d at 652-653. Privity means a mutual or successive relationship to the same rights of property .

One touchstone of privity for purposes of res judicata is that a party's interest is so identical with another that representation by one party is representation of the other's legal right. Nero V. Ferris, 222 Va. 807, 813, 284 S.E. 2d 828, 831 (1981); Storm V. Nationwide Mutual Insurance Co., 199 Va. 130, 134-135, 97 S.E. 2d 759, 762 (1957).

Clearly, the rights and interests of Dr. Landess, the respondent seeking privity, are so distinct and separate from those of Virginia Phototherapy, to which he seeks privity in the prior action, that neither party could represent the other's interests.

Virginia Phototherapy, L.L.C., by its own admission is not a health care provider and as such is not actionable under medical malpractice. VIRGINIA PHOTOTHERAPY HAS NO STANDING TO INVOKE DR. LANDESS' RIGHTS ,AS A PHYSICIAN, UNDER THE VIRGINIA MEDICAL MALPRACTICE ACT. This Medical malpractice action could only be brought against and represented only by Dr. Landess in his capacity as a licensed healthcare provider. Furthermore, Dr. Landess, as a physician , has incorporated himself as a professional corporation , so that again, the legal positions of the two cannot be represented by each other.

Privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same state of facts; Benson v. Wanda Petroleum Co., 468 S.W. 2d 361, 363 (Tex. 1971).

"People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or(3) they can be successors in interest, deriving their claims through a party to the prior action." Amstadt v. U.S. Brass Corp., 919 S.W. 2d at 652-653.

The record establishes that Virginia Photo and Dr. Landess, a licensed physician, were each wholly separate and distinct entities. There is nothing in record demonstrating that Dr. Landess controlled the litigation in Jaffe v. Virginia Phototherapy, L.L.C. , nor that his interest's as a physician were represented, nor is it contended that he is a successor in interest to Virginia Phototherapy.

Indeed, Virginia Photo arguably took positions that were contrary to those of Dr. Landess. Specifically, Virginia Phototherapy argued, and the court agreed, that it was not a licensed healthcare provider and was not actionable for medical malpractice under the Virginia Medical Malpractice Act and thus owed Dr. Landess, the respondent , no duty; and that because no doctor- patient relationship existed between Virginia Phototherapy and Jaffe ,they could not, once again be held liable.

These positions can be construed to support Virginia Phototherapy's argument that they **could not and did not represent Dr. Landess' interest regarding his personal** liabilities as a physician health care provider under medical malpractice.

When parties take conflicting positions, they cannot be considered to be in privity; Cluett v. Medical Protective Co., 829 S.W. 2d 822, 826, Tex. App. 1992) in which the court held "where respective positions of insured and insurer

were in conflict, no privity existed between the parties".

The other key touchstone of privity for purposes of res judicata is that "mutuality" must exist such that , Dr. Landess would have been bound had the prior litigation of the issues reached the opposite result .

Virginia continues to reaffirm adherance to the principle of mutuality which holds that "a litigant is generally prevented from invoking the preclusive force of a judgment unless he would have been bound had the prior litigation of the issue reached the opposite result. Bates v. Devers, 214 Va. 667,671, 202 S.E. 2d 917, 921 (1974); Angstadt V. Atlantic Mutual Insurance C., 249 Va. 444, 457, S.E.. 2d 86 (1995); Glasco v. Ballard, 249 Va. 61, 452 S.E. 2d 854 (1995).

Due to the statutory relationship specified by 13.1-1019 of the Virginia Code, which states that "**no member, manager or other agent of a limited liability company shall have any personal obligation for any liabilities of a limited liability company, whether such liabilities arise in contract, tort or otherwise, solely by reason of being a member, manager or agent of a limited liability company**; and because of 13.1-1020 which states that "**a member of a limited liability company is not a proper party to a proceeding by or against a limited liability.**

In addition, because of the duty imposed by the voluntary contractual relationship between Landess and Virginia Phototherapy, L.L.C , in the company operating agreement, had the original claim resulted in a judgment against Virginia Phototherapy, Dr. Landess could not and would not have been bound by that judgment in his capacity as a physician health care provider. This lack of return liability or mutuality is further supported by 13.1-1308 of the Virginia code,

which provides that "a membership interest in a limited liability company is one of personal property. Therefore the absence of mutuality further defeats any claim of privity as a basis for dismissal under res judicata.

CONCLUSION

For the reasons set forth above, the Petition For Writ Of Certiorari should be granted. And this many returned to the lower court for a trial by jury on the merits of the cause.

Respectfully Submitted,

Allen V. Jaffe, Pro Se
3211 Fox Chase Drive
Midlothian, Virginia 23112
Tel (804) 744-8381
Fax (804) 744-8381

APPENDIX A

COMMONWEALTH OF VIRGINIA
FOURTEENTH JUDICIAL CIRCUIT

George F. Tidey
Judge
L.A. Harris, Jr.
Judge
Catherine C. Hammond
Judge
Gary A. Hicks
Judge

Government Complex
4301 E. Parham Road
Richmond, V A 23273-7032

Telephone: (804) 501-5834
Fascimile: (804) 501-5505

CIRCUIT COURT OF HENRICO COUNTY

17 September 2003

Allen V. Jaffe
301 Fox Chase Drive
Midlothian, VA 23112
Plaintiff

John R. Walk
Hirschler Fleischer
701 East Byrd Street
P.O. Box 500
Richmond, VA 23218
Counsel for Defendant

Re: Jaffe v. Landess
Civil Case No. CL02-1729

Dear Mr. Jaffe and Mr. Walk:

This matter comes before the Court pursuant to Ronald Mark Landess', DPM ("Landess") Special Plea and Motion for Sanctions as well as Allen V. Jaffe's ("Jaffe") Motion to Disallow Defendant's Discovery Requests and Motion for a Protective Order. Following the hearing on August 22, 2003, the Court permitted the parties an opportunity to submit written memoranda, which has been received.

Upon consideration of the arguments of the parties, a review of the record, and the memoranda of the parties, the Court does hereby grant the Special Plea of Landess. Res judicata precludes parties from litigating a claim for which a court has already entered a final judgment on the merits. State Water Control Board v. Smithfield Foods, Inc., 261 Va. 209,214 (2001). In order to prove res judicata, a party must "establish identity of the remedies sought, identity of the cause of action, identity of the parties, and identity of the qualify of the persons for or against whom the claim is made." Id. (quoting Balbir Brar Assoc. v. Consolidated Trading and Servs. Corp., 252 Va. 341 (1996). The Court finds that all of the prongs for res judicata have been met and, therefore, the action is barred.

Moreover, the Court does deny the Motion for Sanctions by Landess.

In light of the foregoing rulings, the Court does not need to address the merits of Jaffe's Motion to Disallow Defendant's Discovery Requests and Motion for a Protective Order.

Mr. Walk is to prepare an Order consistent with the rulings of the Court and forward the same to Mr. Jaffe as that either or both parties may note their exceptions or objections. Mr. Walk is to have the Order returned to the Court on or before: Thursday, October 22, 2003.

Thanking you, I am

Very truly yours,

/s/ Gary A. Hicks
Gary A. Hicks
Judge

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT OF HENRICO COUNTY

ALLEN V. JAFFE,

Plaintiff,

v. Case No. CLO2-1729

RONALD MARK LANDESS, DPM,

Defendant.

[ENTERED: OCTOBER 20, 2003]

FINAL ORDER

On August 22, 2003, came plaintiff Allen V. Jaffe, *pro se*, and defendant Ronald M. Landess, by counsel, on the Special Plea, Motion for Sanctions, and Motion to Compel and for Sanctions filed by defendant Ronald M. Landess and on the Motion to Disallow Defendant's Request for Admissions and Motion for Protective Order of plaintiff Allen V. Jaffe, all of which were duly noticed for hearing;

It appearing from a review of a certified copy of the Court's file introduced into evidence in this proceeding that plaintiff Allen V. Jaffe has previously filed an action styled Jaffe v. Virginia PhotoTherapy, LLC, No. CLOl-1543, that such action was dismissed with prejudice by Order dated

April 9, 2002, and that Jaffe failed to appeal such decision; and

It appearing from a review of a certified copy of the Court's file introduced into evidence in this proceeding that plaintiff Allen V. Jaffe has previously filed an action styled Jaffe v. Virginia PhotoTherapy, LLC. No. CH01-1438, that such action was dismissed with prejudice by Order dated March 8, 2002, and that Jaffe failed to appeal such decision; and

It appearing from a review of a certified copy of the Court's file introduced into evidence in this proceeding that plaintiff Allen V. Jaffe has previously filed an action styled Jaffe v. Virginia PhotoTherapy, LLC. No. CLO1-2094, that such action was dismissed with prejudice by Order dated August 8, 2002, and that Jaffe failed to appeal such decision; and

It appearing from a review of a certified copy of the Court's file introduced into evidence in this proceeding that plaintiff Allen V. Jaffe has previously filed an action styled Jaffe v. Virginia PhotoTherapy, LLC, No. CL02-1730; that such action was dismissed with prejudice by Order dated January 24, 2003 an the basis that the claims and causes of action asserted therein were barred by the doctrine of *res judicata* by virtue of the final adjudications referred to above; that Jaffe attempted to appeal such decision to the Virginia Supreme Court; and that by Order dated June 25, 2003, the Virginia Supreme Court denied his Petition for Appeal and by Order dated September 12, 2003 denied his Petition for Rehearing; and

In connection with this ruling, the Court receives into evidence the certified copy of the Virginia Supreme Court's September 12, 2003 Order denying Jaffe's Petition for Rehearing and dismissing his appeal of No. CLO2-1730; and

It appearing to the Court that all of the above referenced actions arose from the same hair removal treatments provided by Virginia PhotoTherapy, LLC which form the basis of the subject action; and

It appearing to the Court from the Stipulation of the parties introduced into evidence in this proceeding and the exhibits thereto that at all times relevant to this action defendant Ronald M. Landess has been the sole member and manager of Virginia PhotoTherapy, LLC; and

It appearing to the Court from a review of the allegations of the Complaint herein that each of the claims and causes of action asserted against defendant Ronald M. Landess have been previously asserted against Virginia PhotoTherapy, LLC, in one or more of the above-referenced actions; and

It appearing to the Court based upon all of the foregoing that defendant Ronald M. Landess is in privity with Virginia PhotoTherapy, LLC for purposes of the Court's consideration of the defendant's Special Plea of res judicata herein; and

It appearing to the Court that each of the elements of res judicata has been proven by defendant Ronald M. Landess;

Upon consideration of the foregoing findings and the authorities cited by defendant in memoranda in support of his Special Plea, and for the reasons stated in the Court's opinion letter dated September 17, 2003, it is hereby ORDERED that the defendant's Special Plea be sustained and that this action be DISMISSED WITH PREJUDICE; and that

Defendant's Motion to Compel and for Sanctions pursuant to Rule 4:12(c) and Motion for Sanctions pursuant to Virginia Code 9 8.01-271.1 be DENIED; and that

Plaintiffs Motion to Disallow Defendant's Request for Admissions and Motion for Protective Order be DENIED.

There being no further motions or matters requiring consideration by the Court, this matter shall be placed by the Clerk among the ended cases.

ENTER: 10/20/03

/s/_____

Judge

I Ask For This As to Ruling on Special Plea; Objected to As to Denial of Motion to Compel and for Sanctions and Motion for Sanctions:

/s/ John R. Walk

John R. Walk (VSB No. 19697)
HIRSCHLER FLEISCHER
701 East Byrd Street (23219)
Post Office Box 500
Richmond, Virginia 23218-0500
Phone: (804) 771-9519
Fax: (804) 644-0957

Counsel for Ronald M. Landess, DPM

I Ask For This As to Denial of Motion to Compel and for Sanctions and Motion for Sanctions; Objected to As to Ruling on Special Plea, Motion to Disallow Defendant's Request for Admissions and Motion for Protective Order:

_____

Allen V. Jaffe, *pro se*
3211 Fox Chase Drive
Midlothian, Virginia 23112

APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT OF HENRICO COUNTY

ALLEN V. JAFFE,
Plaintiff,

v. Case No. CL02-1729

RONALD MARK LANDESS, DPM,
Defendant.

[ENTERED: NOVEMBER 10, 2003]

ORDER IMPOSING SANCTIONS

This day came defendant Ronald M. Landess, by counsel, and moved for sanctions against plaintiff Allen V. Jaffe;

As set forth more fully in the Court's Final Order dated October 20, 2003, prior to filing this action, Jaffe had filed four (4) previous actions against Virginia PhotoTherapy, LLC, all arising from the same hair removal treatments which form the basis of this action and all of which had been adjudicated adverse to Jaffe. The Court finds that Jaffe lacked a good faith basis for bringing this action;

In addition, simultaneously with filing this action, Jaffe filed another case against Virginia PhotoTherapy, LLC, No. CL02-1730. This action had been dismissed by this

Court by Order dated January 24, 2003 and Jaffe's Petition for Appeal had been rejected by the Virginia Supreme Court by Order dated June 25, 2003. The Court finds that Jaffe lacked a good faith basis for continued prosecution of this case after entry of the foregoing Orders;

In response to the filing of this action, Landess filed a Special Plea asserting the defense of *res judicata* and on August 8. 2003, filed his Memorandum in Support of Special Plea in which he set forth authorities which compel the conclusion that this matter was barred by *res judicata*. Jaffe failed at the hearing of this matter to present any contrary authority or to distinguish the authorities cited by Landess and, after being given leave to file a post-hearing memorandum, failed in either of his post-hearing memoranda to cite any contrary authority or to distinguish the authorities cited by Landess. The Court finds that Jaffe lacked any good faith basis for his continued prosecution of this matter after receipt of the Memorandum in Support of Special Plea;

In connection with the preparation for hearing of this matter, Landess propounded a Request for Admissions to Jaffe which sought merely his admission as to the authenticity of pleadings and Orders entered in his prior actions against Virginia PhotoTherapy, LLC. Jaffe refused to admit the authenticity of these documents without any good faith basis for doing so. This caused substantial inconvenience to the Clerk of this Court and the Clerk of the Virginia Supreme Court and expense to Landess in preparing and producing certified copies of these Court records at the hearing of this matter;

The Court issued its opinion by letter dated September 17, 2003 in which it sustained Landess' Special Plea of *res judicata* and instructed the parties to submit a sketch Order in accordance with the Court's rulings. Counsel for Landess timely prepared a sketch Order and submitted same to Jaffe for comment and/ or endorsement. Jaffe failed and refused to endorse the Order or to offer any comments to it, necessitating the scheduling of a hearing for presentation of the sketch Order. Notwithstanding that the hearing was duly noticed for October 20, 2003, Jaffe failed to appear. The Court finds that Jaffe lacked any good faith basis for refusing to endorse the sketch Order or for failing to appear at the hearing which was necessitated by his failure to endorse the sketch Order;

After entry of the final Order at the hearing noticed for that purpose on October 20, 2003 at which Jaffe failed to appear, Jaffe filed a Motion to Vacate said Order. In this Motion to Vacate, Jaffe does not raise any new matter; rather he merely reasserts arguments previously considered and rejected by this Court. Jaffe initiated the hearing for November 10, 2003 and noticed counsel for Landess to be present whereupon counsel for Landess brought on the Motion for Sanctions. The Court finds that Jaffe lacked any good faith basis for filing the Motion to Vacate or bringing it on for hearing;

Upon the basis of the foregoing findings, the Court amends its Final Order dated October 20,2003 to delete its denial of Landess' Motion for Sanctions and Motion to Compel and for Sanctions and hereby awards sanctions pursuant to Virginia Code § 8.01-271.1 and Rule 4:12(c) against plaintiff Allen V. Jaffe in the amount of $350.00 plus court

reporter fees. Judgment shall be entered in favor of defendant Ronald M. Landess in such amount including judgment interest from the date of this Order until payment is made. Jaffe's Motion to Vacate said Final Order is denied. In all other respects, the Final Order entered on October 20,2003 is affirmed and shall be the final judgment of this Court.

ENTER: November 10, 2003

/s/ _____
JUDGE

~~I Ask For This:~~ Objected to as to Amount.

/s/ John R. Walk
John R. Walk (V5B No. 19697)
HIRSCHLER FLEISCHER
701 East Byrd Street (23219)
Post Office Box 500
Richmond, Virginia 23218-0500
Phone: (804) 771-9519
Fax: (804) 644-0957

Seen and Objected to:

/s/ Allen V. Jaffe
Allen V. Jane, *pro se*
3211 Fox Chase Drive
Midlothian, Virginia 23112

APPENDIX D

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 9th day of June, 2004.

Allen v. Jaffe,

Appellant,

against

Record No. 040297
Circuit court No. CL02-1729

Ronald Mark Landess, DPM,

Appellee.

[ENTERED: JUNE 9, 2004]

From the Circuit Court of Henrico County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia H. Krueger, Clerk

By: /s/_____
Deputy Clerk

APPENDIX E

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 1st day of October, 2004.

Allen V. Jaffe,
Appellant,

against Record No. 040297
Circuit Court No. CL02-1729

Ronald Mark Landess, DPM,
Appellee.

[ENTERED: OCTOBER 1, 2004]

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day of June, 2004 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ _____

Clerk

APPENDIX F

IN WITNESS WHEREOF, the Member and the L.L.C. have executed this Agreement on the day and date indicated above.

Virginia PhotoTherapy, L.L.C.

By: Ronald M. Landess
Ronald M. Landess, Sole Member

Ronald M. Landess
Ronald M. Landess, Sole Member

APPENDIX G

Virginia Board of Medicine does not regulate the hair removal procedure and does not require individuals who perform the procedure to be physicians or to have licenses. The owner of Virginia phototherapy is Dr. Ronald Laundess, who is licensed by the Board of Medicine as a podiatrist. However, this is a mere fortuity in that there is no requirement to have a professional license in order to engage in hair removal. Moreover, other than verifying the settings on the Epilight machine, Dr. Landess does not perform the actual procedure on any client of Virginia Phototherapy. Rather, this is routinely done by a technician.

Manufactures of the Epilight devices are regulated by the Food and Drug Administration ("FDA"). The FDA has certain regulations requiring annual registration, listing of devices, good manufacturing practice, labeling, and prohibitions against misbranding and adulteration. *See* 21 C.F.R. Parts 800-895. Specifically, the FDA has approved the Epilight for the removal of unwanted hair and for "permanent hair reduction," which is defined in the manufacturer's January 27, 2000 premarket notification as a :long-term stable reduction in the number of hairs regrowing after a treatment regime." The FDA does not regulate **operators** of the Epilight.

Virginia Phototherapy fully informs its clients of the nature and purpose of the hair removal procedure, the possible alternatives, the risk involved, the possible consequences and the possibility of complications. Moreover, the clients are informed that the procedure is not guaranteed to be permanent. Each client is required to sign a form entitled "Consent to Non-Medical Services."

The Washington Post

HEALTH

Tuesday, May 7, 2002



Physician's assistant Michelle Ballew performs laser hair removal on Rhoda Bassoff-Dunkle of Alma in Tysons Corner Mall.

Cosmetic Lasers: Facing Up to the Risk

As Laser Skin Treatments for Hair, Wrinkles and Other Perceived Flaws Become More Popular, Some Patients Are Getting Burned

By Barbara G. Boodman
Washington Post Staff Writer

Sweltering in a thick, white terry cloth robe, her eyes shielded by rose-colored goggles, a 41-year-old financial consultant chatted amiably in Washington gynecologist Bruce L. Ames systematically pressed the chilled tip of a laser against her outstretched leg. The hair-dryer-shaped handpiece unleashed a series of staccato pops, raising small square red welts that quickly faded.

"It feels like a rubber band snapping against my skin," said the woman, who had paid $6,000 for five laser treatments—this was her second—to remove unwanted hair on her legs, underarms, forearms, bikini line and upper lip.

The woman, who asked not to be identified, is no stranger to cosmetic medicine. For the past few years she has gone to an ophthalmologist for regular injections of Botox, the anti-wrinkle treatment derived from a paralytic poison. Several years ago she had laser eye surgery to eliminate her need for glasses.

"I get hired to do a lot of corporate finance and public speaking, and it really helps if you look good," said the woman, who regularly works out with a personal trainer near her Georgetown home.

Looking good increasingly means undergoing treatment with a laser designed to remove hair, wrinkles, acne scars, brown spots caused by sun damage, broken blood vessels, stretch marks and other skin imperfections. One of the fastest growing and most lucrative areas of medicine, cosmetic laser procedures are barely regulated, and in many states are offered in both doctors' offices and the encounter-counter confines of posh day spas. A burgeoning number of physicians trained in specialties other than dermatology, many eager for free time unfettered by the discounts and dictates of managed care, are leaping lasers. So are spas, whose owners sometimes like technicians or cosmetologists with little training to use medical-level devices capable of causing permanent, disfiguring injury. (See "In the Wrong Hands, Hair Removal Can Cause Burns, Scars, Pigment Changes," Page F6.)



Treatment broke this woman's face, leaving permanent scars.

Initially wielded only by specialized dermatologists with expertise in using lasers, hair removal machines can now be found in the offices of family practitioners, ear, nose and throat specialists, obstetricians, ophthalmologists and even dentists. An industry analyst predicts that the laser hair removal business alone, which didn't exist seven years ago, will generate $2 billion in treatment fees this year.

Although many people appear to be happy with laser procedures, a growing number of patients and physicians say that results can be disappointing—or disastrous. One Washington dermatologist said he is consulting as an expert with plaintiffs in 100 lawsuits around the country involving botched hair removal treatments that resulted in burns, scarring or pigment changes. Dermatologic specialists in Washing-

See LASER, Page F5

1 page

Laser Treatments Are Neither Permanent Nor Guaranteed

LASER, From F1

ous and other skin ray they receive by ear patients with cellulite injection, some inflated by technicians who were wielding laser equipment that was out-of-date, not for properly or not appropriate for a patient's skin type.

'Aesthetic Medicine'

Amos owned the financial consultant in the downtown office of his gynecology practice, which doubles as one of the six locations of Aloes, a 9-year-old chain of hair removal clinics of which he is an owner and medical director.

"This is aesthetic medicine," said Amos, who also chairs the gynecology department at Washington's Columbia Hospital for Women. "We only needs to have hair removed, but they want to." Amos said his clients have ranged in age from a 9-year-old girl who was being teased about her hairy forearms and legs to an 89-year-old man who wanted the nails ripped from his ears.

Seventy percent of Aloes's clients are women, who pay an average of about $1,600 for a package of treatments, usually to remove hair from their faces. Men typically want hair removed from their backs and chests, and sometimes their cheeks, which tends to be more expensive.

Many laser hair removal clients seem satisfied with treatments that reduce or eliminate the need to shave, pluck or wax unwanted hair. But not everybody is happy with the results.

"I think people under better understand what they're going to get than when they're going to get their laser," said Washington dermatologist Tina S. Alster, one of the pioneers of laser dermatologic procedures. A few years ago patients rarely complained but to treat complications of laser surgery. Now, Alster said, she sees at least one a week, "some of whom have the most horrendous burn scars—they look like they've been in a kitchen fire."

Washington dermatologist Elliot F. Battle Jr., an expert in using lasers on dark and tanned skin, agreed. "In the right hands with the right machines, lasers are wonderful," said Battle, who teaches at Harvard and Howard medical schools. "But in the wrong hands, lasers can do a lot of damage."

Industry officials estimate that 10 percent of laser hair removal treatments are being performed by nonphysicians, although it is not known how many of them are nurses working under the supervision of dermatologists or plastic surgeons. Increasingly, cosmetologists and other spa employees who may have limited education and experience are performing laser treatments after a brief training course.

Only five states—New Hampshire, Nebraska, Hawaii, South Dakota and New Jersey—restrict the use of these lasers to physicians, according to Alan G. Weis, a California consultant who tracks state law for laser manufacturers. (In the District, Virginia and Maryland, non-physicians are permitted to use cosmetic lasers with certain restrictions.)

Removing Hair

Dermatologic lasers emit intense beams of light that penetrate several layers of skin and selectively vaporize specific targets—such as the pigment in dark hair or red blood vessels or lesions sign spots. Laser hair removal is best suited to treat dark-colored hairs on light-colored skin. Unwelcome hairs are blasted in the process. All lasers wound the visible top layer of skin, sometimes causing redness or crusting or scarring, depending on the procedure.

When it comes to removing hair, lasers can be much more efficient than electrolysis, in which tiny needles are inserted into a single hair follicle and electrical current is applied to destroy it. Lasers, which are supposed to destroy the root of hair follicles, treat a much larger area with many more hairs, presumably reducing regrowth but not preventing it entirely.

Because hair is often extremely resilient and grows in cycles that are governed by a largely unpredictable combination of heredity and hormones, multiple laser treatments about a month apart are required. Each of these sessions, which can range from a 10-minute upper lip job that costs as little as $50 to $2,000 for a man's back, can be harmless and are devoid of the seriousness and oversight of unwanted scars.

"There is a large amount of money to be made, especially if you hire a technician to do it at $15 an hour," said Nina Cullinan, president of the Allied Health Association, a Colorado-based group that represents what he calls "the high-tech aesthetic industry," which includes spas and beauty salons. "It isn't unusual to have a $1,000 base for a laser bay in $10,000 to $15,000 per month in profit. Now you know why doctors are trying to protect it," said Cullinan, whose group offers a "train a medical director" program that for $2,000 allows physicians to assure that require a doctor to supervise its use.

"This is a huge market," said Steven Shumaldi, a vice president of MEDLITE, LLC, the company that owns Aloes, which has centers in the District, Maryland and Virginia as well as a choice of magnetic resonance imaging (MRI) centers outside the Washington area. "I don't know a woman who doesn't have unwanted hair somewhere, which can be incredibly troubling and embarrassing."

But many dermatologists warn that unethical procedures have no place in spas, or in the offices of physicians tailored to other specialties who regard laser procedures as an easy way to make some fast dollars. Laser treatments, they caution, can cause burns, scars, pigment changes and blindness if the eyes are not protected during treatment. And skin specialists say that serious and even fatal conditions such as melanoma can easily be missed, or mistaken for a benign lesion.

"People are using lasers that are dangerous prematurely and unnecessarily frightening them," said Battle, who noted that he has diagnosed melanomas in several patients on whom he was performing laser hair removal. "A hair removal laser can frighten a dark melanoma which could continue growing, going deep or send metastasizing."

"Lasers are not quick-and-dirty cosmetics," said New York dermatologist Amy Geronemus, president of the 2,400-member American Society for Dermatologic Surgery, who helped test many of the laser devices that have won approval from the Food and Drug Administration (FDA). "These devices have to prevail greatly in the last three to five years, and it is well-known that the incidence of side effects is very low. But because of the seriousness and care of treatment, the consequences of lapses have underestimated the difficulty of performing these procedures successfully."

Permanent Removal?

The volume of lasers is not the only issue: misleading advertisements that promise results unfortunately can't deliver are another concern. Ads for hair removal often include such eye-catching phrases as "Say goodbye to your razor," "Permanent hair removal" or "Never shave or wax again."

According to the FDA, those promises are all misleading and perhaps one of the myths about laser hair removal. The agency says many consumers of hair removal lasers and those who use them are directed only to obtain "permanent reduction" of hair, not "permanent removal." This means that although laser treatments will permanently reduce the total number of body hairs, they will not result in a permanent removal of all hair," the agency says on the Web site.

Tina Alster, a spokesman for Lasers, the world's largest manufacturer of cosmetic lasers, said that the FDA defines permanent reduction as combination of 60 to 80 percent of hair treated over several sessions—a period that can take a year. Alster added that for reasons that remain unclear, laser hair removal ultimately does not work for about 10 percent of patients who undergo multiple treatments.

Alster, the head hair removal claim has spurred with the FDA over an advertising claim since he began using the phrase "permanent hair removal" in patient information materials. In correspondence, Alster says the phrases "safe, effective and permanent," "never shave or wax again" and "is only a few sessions away" do not be misleading and violate Rooney.

On May 30, 2000, an FDA official wrote to Alster the practices Shumaldi, warning him against the use of a statement on the Aloes Web site that the technology used was "safe, effective and permanent."

"It is inappropriate and/or violation of law for Aloes to continue this ... promotion," Steven E. Dobbins, a consumer safety officer at the FDA warned Shumaldi about the permanence claim.

Shumaldi said that statement was removed and Aloes has complied with the law. "We don't promise 100 percent of hair removal 100 percent of the time," he said.

That's not the point, according to FDA spokesman Steven Dobbins. "We're not saying that they're still doing that, but if Aloes is still claiming permanent hair removal in their literature, then they are not in compliance," the said.

Reasonable Interests

Physicians trained in other specialties argue that they can perform many laser procedures just as well as dermatologists, who spend three years studying the skin and sometimes an additional year of advanced laser training in a fellowship. The idea, they say, that only dermatologists and plastic surgeons can use lasers properly is nothing more than economic protectionism.

"I'm a surgeon, and I can use a laser quicker for endovenous ablation," an alternative to hysterectomy that removes the lining of the uterus, said obstetrician-gynecologist Rollin K. Allen-Price, who performs hair removal treatments in his Annandale office. "If I can use it for that, well, a laser machine on hair is just pith, nothing," he said.

Allen-Price, who is licensed in Virginia, was disciplined by the medical board in that state and three others after he left his practice in South Carolina in 1999 without adequate notice to his patients or the hospital where he was practicing.

Allen-Price said that his disciplinary history "has nothing to do with the practice of medicine" and that his problems were caused by his ex-wife, "who reported me to the medical board after I dissed my office abruptly. The laser business in Virginia has nothing to do with the medical board in South Carolina."

Allen-Price, who owns a hair removal laser he bought 24 years ago, said he also does treatments to remove broken blood vessels using a different type of laser. Cosmetic laser procedures, he said, comprise 20 percent of his practice and are his way of encouraging bones from fewer reimbursement by health plans.

Allen-Price scoffs at the notion that cosmetic lasers should be the exclusive province of dermatologists. "Let me not get dermatologists down, but any doctor can do this," he said.

To Robert M. Adrian, one of Washington's busiest laser surgeons, this argument is disingenuous. "Does this mean I should be doing Pap smears on my patients because I'm allowed to?" said Adrian, who is board-certified in internal medicine and dermatology. "It's the doctors who can't make ends meet or who feel that they need to make more money" who are picking up cosmetic lasers, he said.

But patients by Adrian and his peers are endorsed by actual practice in many laser dermatologists' offices. Many specialists delegate hair removal cases, which they find boring and time-consuming, to a nurse whom they supervise.

Alster, who has written a textbook on dermatologic laser procedures, has strict requirements about laser use in his practice. She performs all hair removal procedures on the face, underarms and bikini line and she or another dermatologist performs the first 15 minutes of very large jobs, such as men's backs or women's legs, determining the proper setting before handing the laser to a nurse.

Dermatologist Elliot Battle recently bought the first day spa in Chevy Chase and, with a plastic surgeon, is opening a laser medical practice that will also offer spa services. But he said he will perform all laser hair removal procedures himself. "That's my job," he said.

Steven Amos said that while most of the 20 laser operators at Aloes's six centers are not dermatologists, all must undergo at least 40 hours of training. They are subject to unannounced visits by Amos or medical medical director Shannon Ray Clinton, a recent medical school graduate who completed a one-year internship in family practice, but not a residency, before joining Aloes, which is not affiliated with Aloes Technologies, a Massachusetts firm that makes laser equipment.

"Do I know as much about skin as a dermatologist? No," Amos said. "I really had to educate myself about what a laser does to skin," Amos said that to his knowledge, none of the approximately 10,000 treatments Aloes operators have performed has resulted in a serious complication, such as a scar.

Aloes hires only physicians, nurse practitioners or physician's assistants to perform laser treatments, Amos said, although a physician is not always on site when patients are being treated.

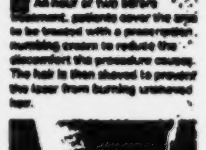
"We're trying to provide a medical atmosphere, but we recognize that this is a medical procedure," he said. If complications arise, Amos said, he or someone in Springfield or Tysons Corner or other centers that are not usually staffed by a physician can call him or Clinton, who works in Aloes's Rockville center. "If necessary," he said, "Shannon can get in his car and go."

How It Works

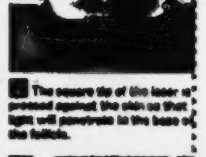
The Food and Drug Administration has approved more than 20 laser devices for hair removal. The procedure associated with one of them, the LightSheer, is described below.



An hour or two before treatment, patients cover the area to be treated with a prescription numbing cream to reduce the discomfort the procedure causes. The hair is then shaved to prevent the laser from burning unwanted hair.



The square tip of the laser is pressed against the skin so that light will penetrate to the base of the follicle.



The laser emits a pulse of light that prevents hair from growing in the follicle but doesn't damage the skin in most cases. It does, however, cause temporary redness of the skin and sometimes crusting. The shaft of hair in the follicle will fall out within a week.

Laser Pointers

Cosmetic laser procedures remain largely unregulated, with plastic surgery or even laser eye surgery. But consumers should remember that the success of medical procedures to remove hair, wrinkles and other skin imperfections is largely dependent on the skill, experience and judgment of the laser operator.

Following are some tips for those contemplating treatment:

■ Make sure a physician—preferably a board-certified dermatologist or plastic surgeon with considerable experience using cosmetic lasers—is performing the procedure or is supervising on site and examines you prior to treatment.

■ Don't make a decision based on cost or marketing. Would you pick a surgeon because he offered the best deal on angioplasty or brief the most aggressive ad? Would a doctor who "promises" results. No medical procedure, regardless of how simple it appears or how skilled the practitioner, is guaranteed to be successful or devoid of complications.

■ Insist that a test patch be done, preferably 48 hours before treatment. It's a lot easier to treat a complication on a small spot rather than your entire face.

■ Ask how many times the procedure has done the procedure, then do the math. Some doctors say they've done thousands of cosmetic laser procedures. But unless they've been using them all day every day for years, that's unlikely. Volume is important: As with virtually every other procedure, more experience typically means better outcomes.

■ Ask whether the laser being used is right for your skin color and hair type and the procedure you're having. Dermatologists who specialize in laser procedures own 15 or 20 lasers, not just one machine. Don't be seduced by "before" and "after" pictures that may be the results of someone else or supplied by the laser manufacturer. Ask to speak to patients. Don't believe claims that lasers will remove blonde, light red or gray hair. Because hair of these colors lacks sufficient melanin, the pigment targeted by the laser, results are only temporary.

■ Ask whether the practitioner owns the laser. Beware any one who has a lack of experience. Like computers, rental lasers moved from one location to another can get jostled, impairing their performance.

■ Speak up immediately if something seems awry. If you experience unusual pain during any procedure, insist that it be halted. Do not tough it out. If your skin becomes discolored after treatment or you have other problems, call a physician immediately. Some complications, such as burns or pigment changes, can be ameliorated if treated promptly. Redness lasts only usually requires emergency treatment.

—Sandra G. Boodman

Sources: American Society for Dermatologic Surgery; Food and Drug Administration; Lasers; American Academy of Dermatology.

2 page

BEST AVAILABLE COPY

H-2

In the Wrong Hands, Hair Removal Can Cause Burns, Scars, Pigment Changes

Terri Bowling, a 36-year-old Pennsylvania office worker eager to be rid of the bother of shaving, wound up with deep second-degree burns that left stripes of checkerboard scars up and down both legs.

Kim McMillon, a 40-year-old vice president of Deutsche Bank, went to a posh Manhattan spa for eradication of facial hair. Some of the hair is gone now, but the right side of McMillon's face is disfigured by a zebra-like pattern of raised scars and discolored patches that heavy makeup and long hair only partly camouflage.

A 50-year-old woman was admitted to Washington Hospital Center recently with third-degree burns inflicted by a treatment to erase wrinkles. A doctor who examined her said the injuries resembled an acid burn.

A Northern Virginia woman in her thirties has spent $10,000 and consulted half a dozen prominent dermatologists in her quest to treat an indented purple scar across the bridge of her nose, the result of a botched treatment of a broken blood vessel seven years ago.

All of these women suffered disfiguring complications from a cosmetic laser procedure: The first two were hair removal treatments done by spa technicians; the second two were performed by dermatologists.

It's impossible to determine the frequency of complications from cosmetic laser procedures, because no one compiles such statistics. The American Society for Dermatologic Surgery found that half its 2,400 members reported seeing an increase in complications in the past year from laser procedures performed by non-medical personnel, frequently spa aestheticians or cosmetologists who work on clients after minimal training with little supervision. The procedure most often cited was laser hair removal that caused irreversible pigment changes, burns or scarring.

Non-physicians aren't the only ones responsible. "Some of the worst damage we've seen was [inflicted] by untrained physicians" who thought they knew how to use a [cosmetic] laser, said Baltimore dermatologist Robert A. Weiss, director of the Maryland Laser, Skin and Vein Institute and an assistant professor at Johns Hopkins University School of Medicine. "There can be a really steep learning curve with lasers," added Weiss, who said that training typically consists of a four- or eight-hour course often given by a manufacturer's representative.

"The real issue is this false belief that these devices are simple and you can't go wrong using them," agreed Chicago dermatologic laser specialist Jerome M. Garden, an assistant professor at Northwestern University School of Medicine. "The truth is that even the most sophisticated user can run into problems. And sometimes these problems [such as pigment changes] aren't obvious for days."



Terri Bowling had laser hair removal on her legs in May 2001. The procedure, done in a Pittsburgh-area spa, left a pattern of burn marks, which have healed into permanent scars.

CHARLEY TOM-BOWLING

There is little dispute that cosmetic laser injuries are hugely under-reported, often because people who suffer from them tend to be too embarrassed to complain. Lawyers say such injuries rarely make it to court, because juries typically have little sympathy for plaintiffs who have had treatment that is not medically necessary.

One notable exception is the lone death associated with laser hair removal. Two years ago a 20-year-old Coast Guard cadet died of an allergic reaction to drugs he was given by a plastic surgeon in McLean prior to a hair removal treatment on his back. His parents, who filed a wrongful death lawsuit, recently received a $725,000 settlement.

"Usually people who are hurt just slink into the woodwork," said Karen Roche, a Pittsburgh plastic surgeon who has treated several women, among them Terri Bowling, who suffered burns from laser hair removal treatments.

In May 2001, Bowling underwent a hair removal treatment on her underarms and legs at a Pittsburgh-area spa. She said in an interview that she had previously undergone several treatments in Roche's office, but went to the spa, which was cheaper and advertised heavily, because she wanted to save money.

At the time of her treatment, Bowling had a dark suntan. Many doctors advise tanned patients to delay treatment because most lasers target pigment in skin as well as hair, making complications are more likely. Bowling said the technician told her a tan wasn't a problem and that there was no need to wait.

Bowling said she was immediately concerned when treatment began: The procedure was extremely painful, unlike her other sessions, which were merely somewhat uncomfortable. Even more alarming were
pieces of skin she saw on the tip of the laser. When
questioned the technician, Bowling said she was told
erroneously—that this was normal. She gritted
teeth and endured the hour-long procedure.

"It hurt so bad I could hardly get dressed," said Bo
ing, who recalled telling her husband in the waiti
room that they needed to go right home. Bowling s
she immediately got into a bathtub full of cold wa
and spent several hours there. The next day, after t
first of several sleepless, pain-wracked nights, Bowli
said her legs swelled to twice their normal size and
gan blistering. Because it was Memorial Day weeken
Bowling said she could not reach her doctor. S
wound up in an emergency room, where a physician
agnosed deep second-degree burns, gave her an anti
otic cream and warned her the lesions must be ba
daged because they could easily become infected, "a
then I'd be in a boatload of trouble." Several days late
Bowling was back in the ER with a blood clot in her le
the result of impaired circulation caused in part by t
bandage.

Bowling has filed a lawsuit against the spa, whic
has since declared bankruptcy. The Pennsylvania me
ical board, after repeated complaints from Roche an
the Allegheny County Medical Society about patient
injured during hair removal treatments, has recent
charged the owner, a dentist, with practicing medicin
without a license.

While the scars on Bowling's legs have faded, the
are still visible and probably permanent. A New Yor
specialist recently told her that a different laser proce
dure might make the marks less noticeable.

Bowling, who is considering the procedure, said sh
is particularly dreading a second summer in which sh
must avoid the sun, which could further damage he
skin. She can't wear a dress or shorts, go to the beach—
her family's favorite vacation—or even take her two
young children to the community pool. "I got really de
pressed," Bowling said. "I'm just starting to come out o
it."

—Sandra G. Boodman